IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1415

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner,*

—against—

NATIONAL LABOR RELATIONS BOARD, ET AL, *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT LEIB'S BRIEF IN OPPOSITION

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RESPONDENT LEIB'S BRIEF IN OPPOSITION

The sole question presented by this Petition is a factual one regarding the status of the contract truckmen of Santini Bros., Inc. under the National Labor Relations Act, as amended, (hereafter generally "the Act"): (1) whether, in determining that the contract truckmen were independent contractors rather than employees, the National Labor Relations Board (hereafter generally the "Board") applied the correct legal test for gauging their status, and (2) whether the

Board's resultant determination is supported by sufficient evidence in the entire record.

These same considerations apply to the question of whether certain provisions in the labor agreement at issue before the Board were advanced and enforced by Local 814 with an unlawful secondary object of regulating the labor policies of these contract truckmen.

Review is unwarranted on the question of status because (1) in grounding its determination that Santini's contract truckmen were independent contractors the Board adhered to well-established pronouncements of this Court; (2) the several United States Courts of Appeals have unanimously approved the legal test employed by the Board in numerous review proceedings; (3) this Court has repeatedly refused to displace the role of the Courts of Appeals in the administrative review process on the issue of substantiality of the evidence; and, (4) no adequate grounds have been advanced by Petitioner entitling it to review.

Review is unwarranted on the "hot cargo" question presented by certain provisions in the labor agreement because (1) the Board again adhered to established principles for statutory construction of the Act established by this Court, and (2) Petitioner has advanced no sufficient ground entitling it to this Court's consideration.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, after applying the common law "right of control" test and after reviewing all relevant and material factors, the Board's determination that Santini's contract truckmen are independent contractors

was supported by substantial evidence and entitled to enforcement by the Court of Appeals.

2. Whether the Board's determination that Article 24 was advanced and enforced by Local 814 with an unlawful, secondary object of regulating the labor policies of self-employed persons, Santini's contract truckmen, was likewise entitled to enforcement by the Court of Appeals.

COUNTERSTATEMENT OF THE CASE

Local 814 suggests this Court's review is required because the Board's decisions in Santini (this case) and in *Local 815, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Molloy Brothers Moving and Storage, Inc.) and Lloyd Townsend*, 208 NLRB 276, 85 L.R.R.M. 1349 (1974) (hereafter "Molloy Bros."), are essentially irreconcilable and they ask this Court to draw the conclusion that the Labor Board applied incorrect standards. That is not the case. The decisions in *Santini* and *Molloy Bros.* can readily be reconciled. Contrary to Local 814's contention, there are only two basic similarities between the administrative trial records in *Santini* and in *Molloy Bros., i.e.,* they involve the same industry and they involve the same labor organization. As recognized by the Board, and as accepted by the Court of Appeals, the cases involve different employers with vastly different employment practices. The Administrative Law Judge noted these differences; the Board noted and relied upon them and the Court of Appeals accepted that reliance.[1]

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[1] Initial Decision, Pet. App. A, at 60a, fn. 18; 223 NLRB No. 121, 91 L.R.R.M. 1543, 1544; 546 F.2d 989, 991 (D.C. Cir. 1976). Two

In view of the confusion which Local 814 engenders in this Record by its continued reliance upon *Molloy* and the dissenting opinions at the Board and in the Court of Appeals, we prefer to restate the essential facts of the *Santini* case which were relied upon by the Board and the Court of Appeals in reaching judgment.

Santini is a certificated common carrier in the moving and storage industry (E. 34).[2] It holds a certificate of Public Convenience and Necessity issued by the ICC permitting it to operate over irregular routes in some 28 states. *Id.*

In addition to its extensive warehousing of household goods and commercial moves within the several metropolitan areas in which Santini has both main and branch offices, Santini is engaged in local and long distance moving (E. 35). Local moving is classified as work within an approximate 90-100 miles radius in New York City (E. 25; 74-75). Long distance moving is classified as being in excess of 500 miles. *Id.*[3]

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members of the Board, Members Miller and Penello, participated in both the *Santini* and *Molloy Bros.* decisions. To suggest that those decisions are irreconcilable is to suggest that Members Miller and Penello were less than aware of their responsibility.

[2] "A" refers to references in the Appendix of Petitioner in the court below; "E" refers to references in the Exhibit Volumes of Petitioner in the court below; "Petition" refers to appropriate pages in Petitioner's Petition; "Pet. App." refers to appropriate pages in the Appendix to Petitioner's Petition.

[3] Local 814 does represent those employees of Santini who do local moving and warehousing. Local 814 members rarely, if ever, make trips in excess of 500 miles. Of over 1,000 such trips made in any given year, such employees may make such trips only 2 or 3 times (E. 36, 75, 80; 256-257).

Although prior to 1948, major moving and storage companies in New York had used employees to perform long distance moves, now some twenty carriers, including Santini, use contract truckmen for such work (E. 177-178; 213).

The situation now before the Court arose in 1971 and 1972, when Local 814 sought to require those contract truckmen driving long distance for Santini to join the union and sought to make Santini enforce such membership pursuant to certain contract provisions in the 1971-1974 Agreement then existing between the Moving and Storage Industry of New York (of which Santini was a member) and Local 814. Respondent Leib filed unfair labor practice charges with the Board on behalf of several contract truckmen adversely affected by such action. The proceedings before the Board and the subsequent affirmance of the Board by the Court of Appeals arise from those charges.

(a) *Santini's Branch Offices*—To accomplish both its local and long distance moving, Santini has a main office and warehouse in the Bronx, and branch offices located in Miami, Florida, and Chicago, Illinois (A. 153, 267-268)

The Miami branch office was started because the Company experienced an extremely small percentage of backhaul revenue in its trips from New York to Florida (A. 135). The Company's long distance revenue, generated by the Florida branch, indicates the small percentage of long distance backhaul revenue generated prior to the opening of the Miami branch (A. 136) For example, in 1956, the long distance backhaul revenue was a mere $6,574.00 (A. 136); by 1972

the revenue had increased to $820,000.00 (A. 136). The long distance revenue reflects backhaul tonnage from Florida to New York and tonnage emanating from Florida to other parts of the country (E. 138, 139).

From 1962 until approximately 1967, the Company operated its long distance hauling, using both contract truckmen and salaried Local 814 employees (E. 60; A. 175, 182). The gradual change to a contract truckmen type of operation was made as long distance employees became contract truckmen, retired or quit (E. 60; A. 175-176, 181-182). Not one employee driver was pressured by Santini to become a contract truckman (A. 175), and *not one* employee-driver who hauled locally during that period ever expressed a desire to haul long distance in an employee capacity (A. 181-182). Nor did any Local 814 representative ever complain that Santini's use of contract truckmen for long distance hauling deprived employee-drivers of work (A. 323).

In 1962, Santini's long distance revenue was $1,200,000 (A. 138). In 1972, the total long distance revenue was $3,608,000, representing an increase of 200 percent. Of this amount, $820,000, or approximately 22 percent, was generated in Florida (A. 135, 138). Approximately one-seventh of Santini's long distance revenue results from the booking of United Van Lines, Inc. (hereafter "United") tonnage (A. 143). Santini is one of 500 to 600 agents which book for United.

There were presently approximately 24 contract truckmen who had contracted with Santini to perform long distance hauling (A. 141). Of the 24, nine were under contract to and operated from the Company's Miami branch office (A. 141).[4] Of the 24 contract

[4] Miami is clearly outside Local 814's jurisdiction.

truckmen, six to seven were under permanent lease to, and hauled exclusively for, United (E. 160, 203; A. 150-151). Another four, based in both New York and Florida, hauled exclusively for United during the peak season—about six months of the year (A. 152).

(b) *The Contract Trucking Operation*—While becoming a contract truckman presents a unique business opportunity to the industrious and responsible driver who wants to get ahead, it takes considerable skill and initiative (E. 170-171, 207).[5]

There is no minimum income guarantee (A. 103). The truckman must generate sufficient revenue to pay for: (1) a power units which costs from $10,000 to $35,000, unless he chooses to lease from a third party; and (2) all expenses of operation, including repairs and maintenance to the power unit, tires, and tubes for the power unit, fuel, oil, lubricants, garaging, parking, scale costs, tolls, tunnels, highway use or mileage taxes, packing materials when he packs, labor, basic state license plates, meals and lodging (E. 50, 51, 52; 450-467; A. 103, 107). The contract truckman is responsible for damages to any item he hauls up to $10.00 per item, or a maximum of $100.00 per shipment (A. 105; E. 468-480). If a contract truckman or his employees has packed or unpacked a fragile item, he is responsible for the full amount of the claim unless he can demonstrate that neither he nor any of his employees were at fault (E. 450-467). For lost items, the contract truckman is fully accountable for the claim (E. 450-467).

[5] Contract truckmen generally earn more money than employee-drivers (E. 163-164).

Moreover, the contract truckman must pay for any and all telephone and other communications which he makes to Santini (E. 450-467 p. 459-460).

The contract truckman must fund a cash reserve which he may accumulate out of his generated revenue in the sum of $3,000.00 (E. 450-467; E. 74; A. 106) [6] United has calculated that a contract truckman must generate at least $200.00 per day in revenue to properly meet these many financial obligations and to make an adequate profit (A. 213-214).

The contract truckman must also keep adequate books and records, which includes the filing of the appropriate IRS forms required by an *employer* (A. 107, 110-111).

Coupled with his financial obligations, the contract truckman must organize and administer his business of packing, loading, transporting, unloading and communicating with shippers consistent with ICC and DOT regulations. Some fail (E. 207). Others succeed to the point where they purchase several power units (A. 86, 87, 97, 101).

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[6] It should be noted that a security deposit of one sort or another is not at all unusual in contracts of all types, to insure compliance by the obligor. It might be pointed out that while performing in Santini's service, a contract truckman uses a trailer owned by Santini of a very substantial value. Certainly Santini is entitled to some security in connection with the use of this equipment. Moreover, the contract truckman is chargeable for the full amount of fragile articles packed or unpacked by him or his employees or articles lost in transit. Some of these articles, such as paintings, silverware, glassware, etc., are extremely valuable, and thus Santini requires a satisfactory waiting period to assess such claims before returning the performance deposit to the contract truckman upon contract termination.

Should a driver elect to become a contract truckman, he may decide either to purchase or lease a power unit (E. 191, 192, 199; A. 78, 87). In approximately 90 percent of the cases, the contract truckman finances his unit from a third party (E. 199). In 10 percent of the cases, the units have been financed by Santini under a normal "arm's length", conditional sales type of agreement (E. 191-192, 199). The method of financing has no effect on any other facet of the relationship between Santini and the truckmen (E. 192).

The contract truckman then signs an agreement with Santini (E. 450-467).[7] This agreement provides that the equipment shall be operated under Santini's exclusive control in the *transportation, loading, unloading, and delivery* of cargo in accordance with shipping contracts and/or bills of lading relating to goods hauled under its operating authority. Control and use are restricted under the agreement to the meaning as enacted and interpreted by the ICC (E. 450-467 p. 453).[8]

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[7] The Agreement states, in part:

"22. *INTENT*

"a) It is expressly understood and agreed by, and it is the intent of the parties hereto that Contractor is an independent contractor only and neither Contractor nor its employees are employees of the Carrier. It is understood and agreed that Carrier has not the right to, and will not control or endeavor to control the manner, or prescribe the method, of doing that portion of the business of Carrier which is contracted for herein by Contractor. Contractor will be held responsible for results only." (E. 463)

The Service Agreement expresses the intent of the parties. The parties intent must be given weight. *Lorenz Schneider Co.* v. *N.L.R.B.*, 517 F.2d 445, 449-452 (2d Cir. 1975).

[8] Pertinent parts of Section 1057.4, ICC regulations, relating to equipment leasing, read:

Also, under the terms of the Service Agreement, the owner-operator is free to market his equipment and his skills to any other carrier at will upon merely giving written notice, subject only to the requirement that he complete the delivery of any cargo, the hauling of which he has undertaken (E. 450-467 p. 463).

The most common percentage arrangement contained in these agreements is 50 percent of the tariff (E. 48, 138; A. 84, 85; E. 450-467). Two contract truckmen who provide both power unit and trailer have 65 percent contracts (A. 85). Another who hauls exclusively within the State of Florida has a 55 percent contract (A. 85). Still other contract truckmen have contracted for 52½ percent during the peak summer month season (A. 85). Because trips in the 100 to 500 mile radius are relatively unprofitable, contract truckmen have negotiated trip percentages for these hauls varying from 50 to 70 percent (E. 85-87; A. 85-86).

"§ 1057.4. *Augmenting Equipment*

(a) Contract requirements. The contract, lease, or other arrangement for the use of such equipment:

• • •

(4) Exclusive possession and responsibilities. *Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement,* except: . . ." (Emphasis added.)

The ICC requires this exclusive use and control provision in order to prevent: (1) A carrier from absolving itself of its responsibility to a shipper under its operating authority; (2) One carrier from leasing equipment from another carrier and using that equipment to haul under the operating authority of the lessor, thereby expending the lessee's operating authority; and (3) a lessor-owner from hauling cargo shipped under the authority of more than one carrier on the same van. See *Tanksley Transfer Company Extension—Points in Four States*, 110 MCC 674, CCH 1970 Fed. Car. Cases, para 36,373 (1970).

Several contract truckmen have owned more than one power unit, and several of the contract truckmen are incorporated (A. 87-88, 94).

Santini's operations department, working with visual aid boards, assembles van loads by size, common destination and timing (E. 46, 84). Long distance, as opposed to local, dispatchers perform these tasks. The load is then offered to the next contract truckman available (E. 46, 52). Normally, contract truckmen are constantly on the phone with the dispatchers, advising them of their availability and inquiring about the availability of loads (E. 46, 130). Contract truckmen can and have refused loads without penalty (E. 53, 126-128; A. 115-117, 119).[9] And, in some cases, shipments are transferred from one load to another at the instance of the contract truckman (E. 127-128). However, in fairness to other available contract truckmen who are awaiting loads, the truckman who refuses a load must go to the bottom of the available truckmen's list, in most cases, before being offered another load (E. 53, 126-128; A. 115-117, 119). A contract truckman can also, without penalty, refuse loads to be delivered within the 100 to 500 mile radius, and will renegotiate his percentage upwards to 70 percent as a condition of acceptance (E. 85-87).

Before starting a trip, a contract truckman may receive, upon request, an advance against: (1) the revenue to which he is entitled on that trip and/or (2) any balance he has remaining in his account from prior trips (E. 139, 172, 195, 197). On rare occasions, the

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[9] By contrast, *Molloy Bros.* employees were suspended for refusing such trips. *Molloy Bros.*, Tr. 367 (lodged in the Court of Appeals as part of the Record in *Santini*).

advance will exceed the independent truckman's cash on hand and to be earned, in which case it comes out of *his* cash reserve. Santini does not advance any of *its* funds to independent truckmen (E. 195-197).

Before beginning his van loading, the contract truckman will first come to a Santini office and pick up a pouch containing a uniform household bill of lading, his scale ticket, and an inventory sheet (E. 107-108, 142-145). He then discusses the inventory with a shipper and obtains the shipper's signature (E. 144). The inventory, uniform bill of lading, and scale tickets are all documents which are required to be provided to the shipper by Santini, pursuant to the household goods regulations promulgated by the ICC (E. 610-629).

The contract truckman then decides how many men he will need to assist him in loading his van (E. 53-54). At that time, he alone also decides the source from which he will obtain his labor, the method of payment, the number of helpers and their hours of work, with no controls imposed on him by Santini (E. 53-54, 450-467 p. 455). The only exception to this procedure occurs when he loads or unloads within the jurisdiction of Local 814. Pursuant to Article 24 of the then current collective bargaining agreement, Local 814 has since 1971 compelled Santini to not permit the contract truckman to load or unload unless he uses Local 814 employees who are paid by the contract truckman in accordance with the terms of the collective bargaining agreement (E. 54, 56, 405-449 p. 432).

The contract truckman then proceeds to the location of the shipper and begins the loading process. The loading of the van is done entirely under his direction

and control and requires considerable skill to minimize damage and to maximize tonnage (E. 108, 450-467 p. 453). The load ordinarily is preliminarily packed prior to loading by employees of Santini (E. 106). If, however, the contract truckman must pack the shipment, he proceeds to do so. Again, the method and manner with which he proceeds to pack are his decisions alone, with no controls imposed by Santini (A. 113, 450-467 p. 453). If the contract truckman packs, he is responsible for purchasing the necessary packing supplies which he can purchase from any source (A. 103). He is solely responsible for any withholding taxes and for making appropriate social security deductions from the money paid to helpers (E. 55, 450-467 p. 454). While loading at the shipper's residence, he will establish delivery dates within a spread established by the salesman's order for service (E. 104, 121). If a customer is dissatisfied with these dates, either the contract truckman or Santini's dispatcher might change the dates after prior discussions with one another (E. 121-122). Also, while at the shipper's residence the contract truckman inquires as to how he can contact the shipper when he arrives at the destination and works out the delivery arrangements. (E. 108-109). Santini has no procedure as to how the contract truckman is to contact the shipper. The choice is his (A. 323).

Because of the nature of the household goods industry, there are no prescribed routes over which a carrier must travel. The reason for this is simply that there may be other shipments to pick up en route to the destination, which require the choice of any number of routes. Thus, to accomplish these results, the contract truckman might take a route consisting of the

best and fastest highways, or he might choose a more scenic route. The choice is his and only his to make (E. 55-56). At no time during transit is he obligated to check with or call Santini and advise it of his whereabouts (E. 55-56; A. 182).

The contract truckman also can choose as to whether and to what extent he will use a co-driver. If he chooses to fly from New York to Florida, for example, he can have his co-driver drive the unit, if he has one (E. 56-57; A. 97-98, 101, 108). Should he elect to use a co-driver, Santini, as the certificated carrier, is obligated to ensure that the co-driver meets DOT requirements (E. 131-133; A. 97-98, 108). Never has Santini failed to qualify a co-driver selected by a contract truckman (E. 132-133). The contract truckman determines the pay, hours, and all conditions of employment for his co-drivers (E. 56-57, 108, 450-467 p. 454). At his destination, he chooses the manner in which he unloads his van. He may or may not elect to hire help (E. 57-58, 450-467 pp. 454-455).

If, after the contract truckman arrives at his destination the shipper does not have the money to pay for the shipment, or if the residence is not available, the shipment may go into storage (E. 146). This is called "storage in transit" (E. 147). If the shipper fails to make payment, the contract truckman customarily discusses the situation with the Santini dispatcher, who, after these discussions, will decide the warehouse into which the shipment will be placed (E. 147-148). On occasion, the shipper will be able to come up with the payment within a short period of time after arrival. In these situations, it is solely within the contract truckman's discretion as to whether he will place the

shipment in storage or hold the shipment on his van until payment can be made (E. 148-148b; A. 109-110). Contract truckmen have waived waiting charges if it was not inconvenient for them to wait. When such charges have been waived, they have not been subject to criticism or had any penalty imposed by Santini (A. 110).

Prior to 1966, United and Santini had a 90-day inspection program. In that year, the Department of Transportation director in Kansas City advised United that the 90-day period was not sufficient, at which time United's inspection period was reduced to 60 days (A. 275-276). Having learned that the 60-day period instituted by United apparently satisfied the regular and periodical requirements of the DOT, Santini then adopted a similar program (A. 88-89).

The contract truckman and Santini each bear one-half the cost of safety inspections (E. 468-480 pp. 472-473). This inspection involves both tractor and trailer. Santini bears half the cost because it customarily owns the trailer.

According to Mr. Sclafani, Traffic Manager for the Company since 1966, at no time has the Company imposed a suspension from service on any contract truckman for any reason (E. 262-264; A. 322).[10]

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[10] Petitioner's statement that contract truckmen may be suspended or terminated when Santini or United are dissatisfied with their performance, Pet. 8, does not comport either with the record or with the Administrative Law Judge's finding, which is squarely to the contrary:

> It is significant that neither Santini nor United purport to exercise disciplinary authority over the contractors (or contractors-employees) or to invoke disciplinary penalties or reprimands; and that the only remedy available and invoked where

Santini has no rules or regulations which it has adopted for terminating contracts with contract truckmen (E. 163). Two contracts were terminated because the contract truckmen deliberately falsified their tonnage weights, in violation of ICC regulations and in breach of their agreements with Santini (E. 123, 208, 450-467 pp. 463-464). A contract was terminated because the truckman constantly got lost en route; one such occasion lasted for several days after his fully-loaded van was found unattended (E. 124, 204). On another occasion, a truckman simply "could not cut" the "finances," "responsibilities of communicating with shippers," and "all the responsibilities" that go into being a responsible businessman (E. 124, 207).

(c) *Proceedings Below.*—An Administrative Law Judge of the National Labor Relations Board, after hearing three days of testimony, Initial Decision, Pet. App. A, at 7a, concluded in an 84-page opinion that the individuals involved were independent contractors, *id.*, at 82a. A Division of the National Labor Relations Board affirmed. 208 NLRB 184, 85 L.R.R.M. 1518 (1974). On Local 814's Petition for Review, and the Board's cross-application for enforcement, the Court of Appeals, concerned by the Board's decision in *Molloy Brothers,* 208 NLRB 276, 85 L.R.R.M. 1349 (1974), remanded to the Board for clarification of the Board's position on the employee-independent contractor status of the individuals concerned. 512 F.2d 564, 567-568 (D.C. Cir. 1975). On remand, the Board

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there is dissatisfaction with contract performance (including contractor's failure to comply with government regulations, which compliance is an express obligation under the contract) is termination of the contract in Santini's case. . . ." (Pet. App. A, at 42a).

reaffirmed its judgment in this case, noting that "*Santini* is in sharp contrast to *Molloy*", that "the controls employed upon Molloy owner-operators were much greater than those exercised over the Santini drivers" and that the record in *Molloy* "show[ed] 'pervasive control' over owner-operators". 223 NLRB No. 121, 91 L.R.R.M. 1543, 1544 (1976). The Court of Appeals affirmed and ordered the decision enforced, noting that the Board had "articulated the factual distinctions between its two decisions", distinctions which "indicate that Molloy Brothers exercises greater control over its owner-operators than Santini Brothers." 546 F.2d 989, 991 (D.C. Cir. 1976). As previously indicated, members Miller and Penello participated in both the initial *Santini* and *Molloy Bros.* opinions at the Board. Local 814 brought this case here for review. Respondent submits that the Petition should be denied. What is involved here, as the Court of Appeals correctly observed, *id.*, was the resolution of factual issues and the question of whether the proper legal standard was applied thereto. As the court below held, "where, as here, an agency is charged with administering a broad statutory mandate, courts must of necessity defer to agency judgment. . . . The distinctions detailed in the Board's Supplemental Decision show that the NLRB has considered the facts in each case and finds them distinguishable, thereby warranting different results. We find that the Board has exercised its judgment and engaged in reasoned analysis in arriving at the different results in *Santini* and *Molloy.*" *Id.*

REASONS FOR DENYING THE WRIT

1. Contrary to Petitioner's Urgings the Board Took Cognizance of and Adhered to Controlling Pronouncements of This Court.

Section 2(3) of the National Labor Relations Act, as amended in 1947, 29 U.S.C. § 152(3), provides that the term "employee" shall not include ". . . any individual having the status of an independent contractor . . .". Although Congress failed to define the terms "employee" and "independent contractor", there is extensive legislative history demonstrating that the term "employee" was intended to mean someone who works for another for hire, and that the question of an individual's status as an "independent contractor" is to be determined by a common law test.

The legislative history of the 1947 amendments makes it clear that Congress specifically rejected a prior Board determination that an individual's employment status be defined in accordance with economic and social reality. This determination had been approved in *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). The House Committee Report on the 1947 Amendments reads as follows in pertinent part:

> "An 'employee', . . . means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U.S. 111 (1944), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'. H.Rpt. 245, 80th Cong., 1st Sess., Page 18, Vol. 1, *Legislative History of the Labor-Management Relations Act*, 1947, p. 309.

In *N.L.R.B.* v. *United Insurance Co. of America*, 390 U.S. 254 (1968) this Court acknowledged that Congress, in passing the 1947 amendments, intended the Board and the courts to use the common law agency test in distinguishing between employees and independent contractors.

The Administrative Law Judge correctly began his legal analysis of the independent contractor question by respecting this Court's instructions in *N.L.R.B.* v. *United Insurance Co. of America, supra.* He said:

> "The standard applied in differentiating 'employee' from 'independent contractor' under the Act is the common law agency test, *N.L.R.B.* v. *United Insurance Co. of America,* 390 U.S. 254, 256 (1968). This was made clear in the Taft-Hartley amendments (1947) of the Wagner Act. Id. Earlier, under the Wagner Act, the Board and the courts had rejected the 'power of control' concept of 'economic reality' in defining 'employee' under the *Act, N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 128-129 (1944), and see further explanation in *Harrison* v. *Greyvan Lines, sub nom United States* v. *Silk,* 331 U.S. 704, 713-714 (1947). Congressional reaction to this construction was adverse, and the 1947 amendment of Section 2(3) of the Act specifically excluded 'any individual having the status of independent contractor' from the definition of employee. 'The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.' *N.L.R.B.* v. *United Insurance Co., supra,* 390 U.S. at 256." Pet. App. A, at 47a-48a.

The Labor Board approved the standard adopted by Administrative Law Judge. 222 NLRB No. 121, 91 L.R.R.M. 1543, 1544. Petitioner concedes that the correct legal standard was employed by the Board. Pet. 20.

As the court below noted, petitioner's only quarrel is with the Board's result. 546 F.2d, at 991. Petitioner argues that *United Insurance Co. of America* compels

a different result. Petitioner's arguments fall both short and wide of their intended mark.

It is elementary that when applying the common law agency test and reaching a legal conclusion which is derived from an examination of all factors bearing on an employment relationship or lack thereof, no single case can be controlling on another except to the extent that the proper legal standard is utilized for the assessment of the facts involved. It was this very problem which prompted this Court to reject the common law test in *N.L.R.B.* v. *Hearst Publications, supra,* in favor of a broader test then thought more precisely designed to effectuate the policies of the then Wagner Act. In this respect, this Court stated:

> "The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as 'the test' for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.
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". . . In short, the assumed simplicity and uniformity, resulting from application of 'common-law standards', does not exist." 322 U.S., at 120-121.

Congress rejected this Court's broad statutory considerations in *Hearst* [11] and compelled a return to the application of the common law test. Under the circumstances and recognizing the many facts which would have to be considered, it must be presumed that Congress anticipated that facially different results would be obtained in those enumerable difficult situations in which the Board is called upon to determine employment status.[12]

As the facts vary so, too, must the result. For that reason alone, the conclusion reached in *United Insurance Co. of America* could not as a matter of law be controlling on the facts here except as to the application of the proper legal standard.

It is that fact that accounts for the seemingly varying results reached on those occasions in which the Board, during the past decade, has addressed the issue of whether owner-operators are employees or indepen-

[11] Chief Judge Bazelon, dissenting in the court below, suggests that considerations of "national labor policy" should control. 512 F.2d, at 568, 570. This appears to suggest a return to the congressionally rejected *Hearst Publications* approach.

[12] "The basic standards for determining employee or independent contractor status are well settled and need not be debated. The issue in each case is the application of those standards to the facts. Our dissenting colleagues set forth at great length their reasons for disagreeing without conclusions based on those facts, but those "reasons" consist of their own comments concerning what they believe to be the situation rather than what the facts show on their face." 223 N.L.R.B. No. 121, 91 L.R.R.M., at 1545, fn. 9.

dent contractors. Respondent's research reveals that the Board has addressed that issue on at least 39 occasions in the common carrier field. In 24 of those cases, the Board determined that the contract truckmen were employees. *Cement Transport, Inc.*, 200 NLRB 841, 82 L.R.R.M. 1255 (1972), 209 NLRB 363, 86 L.R.R.M. (1976); *Maxwell Co.*, 164 NLRB 713, 65 L.R.R.M. 1210 (1967); *Steel City Transport, Inc.*, 166 NLRB 685, 65 L.R.R.M. 1614 (1967); *Crow Gravel Co.*, 168 NLRB 1040, 67 L.R.R.M. 1171 (1967); *Davis Transport, Inc.*, 180 NLRB 966, 73 L.R.R.M. 1207 (1970); *S & W Motor Lines, Inc.*, 179 NLRB No. 136, 72 L.R.R.M. 1510 (1969); *Joint Council of Teamsters 42 (J. K. Barker Trucking Co.)*, 181 NLRB 515, 76 L.R.R.M. 1764 (1970); *Deaton, Inc.*, 187 NLRB 780, 76 L.R.R.M. 1129 (1971) and 203 NLRB 1099, 83 L.R.R.M. 1294 (1973); *Ace Doran, Hauling & Rigging Co.*, 191 NLRB No. 63, 78 L.R.R.M. 1064 (1971); *Tryon Trucking, Inc.*, 192 NLRB 764, (1971); *Aetna Freight Lines, Inc.*, 194 NLRB 740, 79 L.R.R.M. 1042 (1971) and 209 NLRB 850, 85 L.R.R.M. 1614 (1974); *Florida-Texas Freight, Inc.*, 197 NLRB 976, 80 L.R.R.M. 1460 (1972); *Pony Trucking, Inc.*, 198 NLRB No. 59, 81 L.R.R.M. 1249 (1972); *Associated General Contractors of California, Inc.*, 201 NLRB 311, 82 L.R.R.M. 1242 (1973); *Land O' Lakes, Inc.*, 204 NLRB 519, 83 L.R.R.M. 1492 (1973); *Pilot Freight Carriers, Inc.*, 208 NLRB 853, 85 L.R.R.M. 1179 (1974); *Molloy Brothers Moving & Storage, Inc.*, 208 NLRB 276, 85 L.R.R.M. 1349 (1974); *Penn Trucking, Painting & Lettering Corp.*, 215 NLRB 147, 88 L.R.R.M. 1092 (1974); *John Himmer Transfer, Inc.*, 221 NLRB No. 52, 90 L.R.R.M. 1665 (1975); *St. Croix Pulpwood Co.*, 225 NLRB No. 118, 93 L.R.R.M. 1087 (1976); *Robbins Motor Transportation, Inc.*, 225 NLRB No. 99, 93 L.R.R.M. 1115 (1976);

Am Del Co., Inc., 225 NLRB No. 93, 93 L.R.R.M. 1488 (1976); and *John Warner d/b/a D. J. W. Cartage*, 227 NLRB No. 255, 94 L.R.R.M. 1414 (1977).

On the other hand, in the remaining 15 cases, the Board determined that the truckmen were independent contractors. *Sinor, L. C. and Standard Industries, Inc.*, 168 NLRB 467, 66 L.R.R.M. 1365 (1967); *Axco Mining Co., Inc.*, 169 NLRB 491, 67 L.R.R.M. 1345 (1968); *Fleet Transport Co., Inc.*, 196 NLRB 436, 80 L.R.R.M. 1047 (1972); *Conley Motor Express, Inc.*, 197 NLRB 624, 80 L.R.R.M. 1399 (1972); *Independent Rapid Trucking*, 200 NLRB 367, 82 L.R.R.M. 1169 (1972); *Portage Transfer Co., Inc.*, 204 NLRB 787, 83 L.R.R.M. 1348 (1973); *George Transfer & Rigging Co., Inc.*, 208 NLRB 494, 85 L.R.R.M. 1047 (1974); *Santini Bros, Inc., supra; Kreitz Motor Express, Inc.*, 210 NLRB 27, 86 L.R.R.M. 1217 (1974); *Daily Express, Inc.*, 211 NLRB 92, 86 L.R.R.M. 1355 (1974); *Fraley & Schilling, Inc.*, 211 NLRB 422, 87 L.R.R.M. 1378 (1974); *Ace Doran Hauling & Rigging Co., Inc.*, 214 NLRB 798, 87 L.R.R.M. 1525 (1974); *Dixie Transport Co.*, 218 NLRB 1243, 88 L.R.R.M. 1512 (1975); *Twin City Freight, Inc.*, 221 NLRB No. 205, 91 L.R.R.M. 1049 (1975); and *Perkins Motor Transport, Inc.*, 222 NLRB No. 69, 91 L.R.R.M. 1312 (1976).

Less than a dozen of the Board decisions on the employment versus independent contractor status of owner-operators in the common carrier field have reached the Courts of Appeals. In each instance, however, irrespective of whether the Board found employment status or independent contractor status, the Court of Appeals, once having determined that the proper legal test was applied, affirmed the Board's conclusions. This demonstrates as clearly as anything can the fact

that such decisions primarily turn on the facts of each case. The strictures imposed by the review provisions of the Administrative Procedures Act, 5 U.S.C. § 706, and due deference to the principles enunciated in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951), mandate that result. See, by way of illustration, *Maxwell Co.* v. *NLRB*, 414 F.2d 477 (6th Cir. 1969); *NLRB* v. *Davis Transport, Inc.*, 433 F.2d 363 (6th Cir. 1970); *Joint Council of Teamsters No. 42* v. *NLRB*, 450 F.2d 1322 (D.C. Cir. 1971); *Ace Doran Hauling & Rigging Co.* v. *NLRB*, 462 F.2d 190 (6th Cir. 1972); *NLRB* v. *Pony Trucking, Inc.*, 486 F.2d 1039 (6th Cir. 1973); *NLRB* v. *Cement Transport Co.*, 490 F.2d 1024 (6th Cir. 1974); *NLRB* v. *Deaton, Inc.*, 502 F.2d 1221 (5th Cir. 1975); *Aetna Freight Lines, Inc.* v. *NLRB*, 520 F.2d 928 (6th Cir. 1975); and *Teamsters, Local 814 (Santini Bros., Inc.)* v. *NLRB, supra.*

2. The Universal Camera Standard for Judicial Review of Agency Determinations Was Not Met

The standard for review of findings of the Board was established in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1954), in which it was held that the Board's findings should not be overturned unless the reviewing court can conscientiously find that there is a lack of substantial evidence to support the Board's findings after consideration of the record as a whole, including the Administrative Law Judge's decision. The Board's findings are conclusive if supported by substantial evidence. *NLRB* v. *Walton*, 322 F.2d 187 (5th Cir. 1963); 5 U.S.C. § 706.

While the determination of employee versus independent contractor status involves no special adminis-

trative expertise which courts do not possess, *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 260 (1968), this does not authorize reviewing courts to displace the Board's choice between two fairly conflicting views, even though the court would have made a different choice had the matter been before it *de novo*. *Universal Camera Corp.*, supra at 488.

Despite the fact that the Administrative Law Judge who originally determined that Santini's contract truckmen were independent contractors had demonstrated an awareness of and took into consideration the different result reached by the Administrative Law Judge in *Molloy Bros.*, Pet. App. A, at 60a-61a, fn. 181 and further despite the fact that *Santini* and *Molloy* cases were unanimously decided by three member panels of the Board, two members of which served on both panels, the Court below initially remanded this case to the Board to clarify the different results reached in *Santini* and *Molloy*. 512 F.2d at 567-568. Rather than returning the case to a three member panel, the Labor Board submitted the record to the complete Board. A three member majority carefully, but flatly, concluded that the *Santini* and *Molloy* cases were sufficiently factually dissimilar so as to compel different results. 223 NLRB No. 121, 91 L.R.L.M. 1543-1544. The majority of the Board then listed seven factual distinctions which it considered sufficiently controlling. *Id.*

The reviewing court below considered the Board's action on remand, noted the factual distinctions which the Board had drawn between *Santini* and *Molloy Bros.*, 546 F.2d, at 991, fn. 1, and was satisfied that the Board had engaged in sufficient reasoned analysis to justify arriving at different results in the two cases.

In this respect the court said:

> "The remand in this case was to assure that the NLRB had in fact exercised its judgment in nearly simultaneously affirming the decisions of different administrative law judges who had reached ostensibly inconsistent conclusions. The distinctions detailed in the Board's Supplemental Decision show that the NLRB has considered the facts in each case and finds them distinguishable, thereby warranting different results. We find that the Board has exercised its judgment and engaged in reasoned analysis in arriving at the different results in *Santini* and *Molloy*.
>
> "Simply because the petitioner and two Board members do not find the NLRB's arguments persuasive does not establish that the Board has failed to apply reasoned analysis in exercising its judgment. Not all those who apply their reasoning power to a given question come to the same conclusions. The right to a 'reasoned analysis' is a right to a rational, considered decision not a right to a result." 546 F.2d, at 991.

3. This Court's Rule of Non-Interference Equally Compels a Denial of the Petition.

In *NLRB* v. *Pittsburgh S.S. Company*, 340 U.S. 498 (1951), this Court adopted a rule of non-interference in substantiality of evidence cases, choosing to leave undisturbed a conclusion of a Court of Appeals even though this Court might have decided the matter differently were the case before it in the first instance.

This Court stressed:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and

not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. "The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari. . . ." Taft-Hartley Act, § 10 (e), 61 Stat. 148, 29 U.S.C. (Supp. III) § 160 (e). Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393; Revised Rules of the Supreme Court of the United States, Rule 38 (5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." 340 U.S., at 502-503.

This Court's rule of non-interference was recently followed in *South Prairie Const. Co.* v. *Engineers,* 425 U.S. 800 (1976), on the issue of whether a company was a single employer. Stripped to their essence, Petitioner's arguments in support of review on the employer-independent contractor issue are mere variations through which it is urging this Court to re-review a legal conclusion inextricably entwined with the substantiality of the evidence. Congress has chosen to have this issue decided in the manner used by the Board and a Court of Appeals has fulfilled its judicial review responsibilities. Simply put, no further action is necessary to effectuate the administration of the Act.

4. The Board and the Court Below Correctly Decided the § 8(e) Question

In *National Woodwork Manufacturer's Association* v. *NLRB,* 386 U.S. 612 (1967), this Court held that Section 8(e) must be read in the light of all surrounding circumstances to determine if a union's objective is to preserve work for bargaining unit employees, or if its efforts are calculated to satisfy other union objectives.

In a footnote, this Court instructed that as a general proposition such circumstances might include: (1) "the remoteness of the threat of displacement by the . . . services;" (2) "the history of labor relations between the union and the employers who would be boycotted;" and (3) "the economic personality of the industry." 386 U.S., at 644, fn. 38.

In assessing these factors, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." 386 U.S., at 646.

While Local 814 claims that Article 24 is designed only to maintain or regain unit work, obviously such a claim cannot be supported when, in fact: (1) independent truckmen contracted to Santini do not perform local work, find it undesirable economically to haul in the 100 to 500 mile radius, and assist in commercial work only when unit employees are insufficient (E. 150-153); (2) no Santini bargaining unit employee-driver has performed long distance hauling in excess of 500 miles since 1967, with the rare exception of two or three trips each year; (3) from 1967 to 1973, not one Santini bargaining unit employee-driver requested that long distance hauling in excess of 500 miles be assigned to him; (4) Local 814 has not made one request of Santini that any bargaining unit employee-driver perform long distance hauling; and (5) there is a critical shortage of employee-drivers in the New York moving and storage industry.

Moreover, the number of drivers in the Santini bargaining unit has remained intact. There simply has not been, and there currently is, no displacement threat posed either to the industry bargaining unit or to the Santini bargaining unit by the long distance operation.

From 1948 until 1971, Local 814 was aware of the industry's use of contract truckmen and did nothing other than to condone this practice in the 1962, 1965 and 1968 agreements. Not until 1968 did it begin, for the first time, to insist that the contract truckmen become union members.

At no time during the 1968 and 1971 negotiations did Local 814 insist, or even request, that bargaining unit employees displace contract truckmen in performing long distance work. There is no evidence that a

single grievance has been filed during this entire 25-year period objecting to the use of contract truckmen. And not once has Local 814 relied on the subcontracting clause (Article 23, 1971 Agreement, E, 431) to contest the contract truckman method of operation, even though that clause has the stated purpose of preserving unit work.

Plainly and simply, what Local 814 is asserting is that Santini's contract truckmen, who were and are independent contractors and outside the definition of employee in Section 2(3), must become Union members. Article 24 is nothing more than a union signatory clause.

The union signatory requirements of Article 24 are not directed to the return of work, but simply to the acquisition of additional union members at the expense of a cessation of business in the event the contract truckmen refuse to join the Union. Granted, a union has an institutional interest in obtaining new members; but when that interest extends beyond the legitimate, primary confines of the bargaining unit, it becomes unlawful secondary activity. *A. Duie Pyle, Inc.* v. *NLRB (Highway Truck Drivers, etc., Local 107, etc., McCormick, Inc., et al)* 383 F.2d 772 (3rd Cir. 1967); *NLRB* v. *Joint Council of Teamsters No. 38,* 338 F.2d (9th Cir. 1964); *Meat & Highway Drivers, Dockmen, Helpers & Misc. Truck Terminal Employ-*of a cessation of business in the event the contract *ees, Local Union No. 710, etc.* v. *NLRB,* 335 F.2d 709 (1964); *District No. 9, International Association of Machinists* v. *NLRB,* 315 F.2d 33 (1962); *E. A. Gallagher,* 131 NLRB 925 (1961) enf'd, 302 F.2d 897 (D.C. Cir. 1962); *Teamsters Local 66 (Carnation Co.)* 181 NLRB 141 (1970); *San Francisco Newspaper Printing Co.,* 204 NLRB No. 60 (1973).

The secondary impact in this case is substantial. Contract truckmen have had their internal labor relations established against their wishes at the risk of the termination of their contracts and the loss of their business opportunities with Santini.

So drastic is the secondary effect under this arrangement that the Board was compelled recently to hold that such union signatory clauses would be considered unlawful on their face unless the union could come forward with sufficient legitimate primary objectives. *San Francisco Newspaper Printing Co.*, supra. In *San Francisco Newspaper*, the Board said that such contract terminations must be incidental to the accomplishment of an objective relating to the terms and conditions of employment of employees in the bargaining unit.

For all that appears from the Petition, Local 814's Section 8(e) argument is an afterthought. Each of the administrative and judicial bodies below agreed that the Section 8(e) decision was governed by the more basic decision as to whether the individuals concerned were independent contractors or employees. Pet. App. A, 65a-78a; 208 NLRB 184, 85 L.R.R.M. 1518 (1974). And, in this case, a *unanimous* Court of Appeals has agreed. 512 F.2d 564, 568. Local 814 does not suggest that either the Board or the Court applied an improper test. Again, Local 814 simply finds fault with the result, an insufficient basis to insist upon this Court's discretionary review power.

CONCLUSION

This case presents a purely factual dispute—whether the owner-operators who drive long distance

hauls for Santini Bros., Inc. are employees within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3) or whether they are independent contractors. If employees, the conduct of Local 814 may be judged by one standard; if independent contractors, by another. Every other question posed in the Petition is subsidiary to, and the answer follows from the answer to, whether the persons here involved are employees or independent contractors. Thus, whether Local 814 violated Section 8(e) of the Act, 29 U.S.C. 158(e) or whether it violated Section 8(b)(4), 29 U.S.C. § 158(b)(4), depends almost completely upon the status of the individuals involved—employes or independent contractors.

Throughout the whole process to date, there has been a uniform answer to that question. The Administrative Law Judge, in an 84-page opinion, Pet. App. A, 2a-86a; a Division of the National Labor Relations Board, 208 NLRB 184, 85 L.R.R.M. 1518 (1974); a majority of the full Board, 223 NLRB No. 121, 91 L.R.R.M. 1543 (1976); and a majority of the United States Court of Appeals for the District of Columbia Circuit, 512 F.2d 564 (D.C. Cir. 1975) and 546 F.2d 989 (D.C. Cir. 1976), have all provided the same answer to this factual question—they are independent contractors.[13]

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[13] In addition, the Regional Director of the Board's Region 2, who sought an injunction against Local 814 under Section 10(1) of the Act, 29 U.S.C. § 160(1), and the United States District Court Judge who issued the injunction, *Danielson* v. *Local 814 Teamsters*, 355 F.Supp. 1293 (S.D.N.Y. 1973), so found, at least impliedly. Sitting in the District Court, Judge Ward specifically concluded that ". . . certainly a 'reasonable probability' exists that the Board will find that the owner-operators are independent contractors". 355 F.Supp., at 1298.

Local 814, dissatisfied with that result, now asks this Court to enter into this essentially factual dispute. But this Court does not sit to resolve factual questions. *United States* v. *Johnson,* 286 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

This case presents the classic confluence of the rationale behind the "two court rule", *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275 (1948);[14] *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1966)[15] and the intendment of the Administrative Procedures Act to give a *prima facie* effect to the findings of an administrative agency, especially when such findings have been approved by a reviewing court. See 5 U.S.C. § 706; and see *Hamilton and Dayton Railway Co.* v. *Interstate Commerce Commission,* 206 U.S. 142, 154 (1907);[16] *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491 (1951).[17] The factual findings in this case have been made by the

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[14] "A court of law, such as this Court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

[15] ". . . this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below . . .' ."

[16] "The statute given *prima facie* effect to the findings of the Commission, and when those findings are concurred in by the Circuit Court, we think they should not be interfered with, unless the record establishes that clear and unmistakable error has been committed."

[17] And, see *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 357-358 (1939); *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U.S. 72, 75 (1940).

Administrative Law Judge, twice approved by the National Labor Relations Board and, finally, approved by the Court of Appeals. There is no basis for their review here and the Petition should forthwith be denied.

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